Supreme Court
OF THE UNITED STATES

IN THE

OCTOBER TERM—1946

No. 1002

D. M. W. CONTRACTING CO., INC., HARTFORD ACCIDENT and INDEMNITY COMPANY and AETNA CASUALTY and SURETY Co.,

Petitioners,

—*vs.*—

C. R. STOLZ,

Respondent.

REPLY BRIEF OF PETITIONERS

EMANUEL HARRIS,
Counsel for Petitioners.

INDEX

Table of Cases

PAGE

STATUTES

IN THE

Supreme Court
OF THE UNITED STATES

OCTOBER TERM—1946

No.....

D. M. W. CONTRACTING CO., INC., HARTFORD ACCIDENT and INDEMNITY COMPANY and AETNA CASUALTY and SURETY CO.,

Petitioners,

—vs.—

C. R. STOLZ,

Respondent.

REPLY BRIEF OF PETITIONERS

Petitioners' References to the Record.

Respondent states in his brief (p. 2) that petitioners' statement of matters involved is inaccurate and that petitioners cite from their exceptions to the Auditor's Report as "a substitute for the actual record." The citations are from the record as certified by the Court below. The record refers to the transcript, but such transcript was not before the Court below. In the footnote on page 2 of his brief respondent objects to the statement on page 3 of the petition that respondent's counsel verified that Woolin (President of D. M. W.) was unable to testify. The petition cites page 91 of the record as the basis for such statement. Page 91 of the record contains such statement and refers to the transcript (pp. 185, 186) as the source for the state-

ment. Again, respondent objects (p. 2) to the statement on page 4 in the petition that the District Judge directed respondent's counsel, if he were not satisfied with Woolin's sworn statement, to propound interrogatories. The petition refers to page 92 of the record where such fact appears.

The record in the Court below and now before this Court was the joint appendix filed after designation and agreement by counsel for both petitioners and respondent. The statement in respondent's brief that the references in the petition are not the actual record is therefore without basis.

It is said that in the footnote on page 2 of respondent's brief petitioners omit relevant portions of the record. Respondent fails to state what relevant portions were omitted. The footnote is concluded with the statement that "on the basis of the present record, however, petitioners' attempt to color the statement of facts is of no great moment." In view of the last statement, and the failure of respondent to show any inaccuracy or omission in a single instance, respondent's statement that the petition is inaccurate in its citations from the record should be completely disregarded.

Petitioners' Were Not Afforded a Reasonable Opportunity to Present Evidence.

It is stated in respondent's brief (pp. 3 and 4) that "every reasonable opportunity was afforded petitioners to adduce proof", that "petitioners had ample opportunity, at every stage of the case to produce and offer relevant and competent evidence", that "not once did petitioners ever avail themselves of such opportunity", "indeed, no request was ever made by them to present any evidence", and that "petitioners refused to produce evidence by the personal appearance of their witnesses or through the use of their depositions."

In answer to the above statements, we submit the following chronology of facts from the record:

(1) On February 15, 1945 pursuant to the order of the District Court, petitioners filed Woolin's sworn statement with the auditor (Rec. 92).

(2) Respondent's counsel stated he would go through the statement and indicate what he would agree *Woolin would testify to,* and what he would object to and that he (respondent's counsel) could agree on the matter and then submit it to the auditor for consideration (93).

(3) The Auditor indicated that if respondent refused to stipulate *to what Woolin would testify,* he would either give consideration in his report to the facts stated in Woolin's affidavit *as evidence,* or he would consider the affidavit of Woolin as grounds for granting a continuance and granting a reasonable time to petitioners to submit evidence (90).

(4) The Auditor then adjourned the hearing to February 21, 1945, when respondent's counsel stated that he refused to stipulate to any part of Woolin's statement and refused to proceed by interrogatories (93).

(6) The Auditor then requested the parties to file briefs on the questions as to whether any of the facts stated in Woolin's affidavit might be considered *as evidence,* and as to whether the affidavit was sufficient for the granting of a continuance *for the purpose of permitting either side to submit additional evidence* (90).

(7) Such briefs were submitted (90).

(8) The Auditor died before ruling thereon (90).

(9) The successor Auditor applied to the District Court for instructions (27-28).

(10) Over the objection of petitioners (116) the District Court entered an order denying a further continuance to petitioners, directing that the hearings be concluded and directing the successor Auditor to file his report based on the deceased Auditor (28-29).

(11) The successor Auditor filed his report based on such existing record (39).

(12) The District Court thereupon entered judgment on the report of the successor Auditor, *reciting that petitioners had had every reasonable opportunity to produce competent evidence and had failed to do so* (96-97).

We submit that the above facts show that petitioners were misled into relying on respondent's agreement to stipulate as to the testimony of petitioners' witness, or that they would be given a further opportunity to present evidence in person or by deposition. The District Court by its order directing that the hearing be closed on the evidence submitted only by respondent, deprived petitioners of an opportunity to present any evidence.

The Authorities Cited in Respondent's Brief Do Not Support the Contention of Respondent That It Was Not Necessary for the Auditor Who Made the Report on the Evidence to See and Hear the Witnesses.

In the case of *Louisiana* v. *Mississippi*, 282 U. S. 458, quoted by respondent (p. 5), which was an action to establish part of an interstate boundary, *the testimony of both sides* was taken before a commissioner and then referred to a special master to report his findings of fact,

conclusions of law and recommendations for a decree. *No question was raised in that case with respect to the master's report on the testimony taken before the commissioner, as having been made by a master who had not heard or seen the witnesses* and the sole exceptions taken were as to the correctness of the master's findings and conclusions.

The case of *In re Wray,* 233 Fed. 418, cited by respondent (p. 5), was an appeal from the disallowance by a referee of a claim in bankruptcy. The referee died after he entered an order disallowing the claim, but before he had perfected his findings. The District Judge then made an order directing the successor of the deceased referee to certify the entire proceeding, together with the testimony and the exhibits to the District Court, *where the case was tried de novo.*

The case of *O'Grady* v. *Chautauqua Builders Supply Co.,* 33F (2d) 957, cited by respondent (p. 5), is discussed in petitioners' brief (p. 19). In that case, the parties stipulated to the reference to a referee in bankruptcy as a Special Master; the referee died after taking the testimony, but before rendering a decision. Subsequently a hearing *de novo* was had before the Court on the testimony taken before the master, apparently without objection to the procedure.

The case of *Amundson* v. *Clos.,* 271 Ill. 209, 110 N. E. 914, cited by respondent (p. 5), was an action for the registration of title, which was referred to a title examiner to report the substance of the proof and his conclusions thereon. The examiner took the evidence offered by both parties, but died before making any conclusions or filing his report. By order of the Court, the evidence certified by the examiner was filed in court and the cause was heard on such evidence *and any other evidence which any party desired to offer.* It was held in that case that the cause was prop-

erly heard by the Court on the evidence taken before the examiner, *with liberty to the parties to offer any evidence they saw fit.*

The case of *Coel v. Glos*, 232 Ill. 142, 83 N. E. 529, cited by respondent (p. 5) is directly contrary to the contention of respondent and is cited and quoted at length by petitioners in their brief (p. 16) as authority for the proposition that parties are entitled to have the master, who is to form his conclusions as to the facts, hear the testimony of witnesses, and that when the term of a master expires, all proceedings before him come to an end, and that the Court is without authority to again refer the case to another master to report his conclusions as to the issues by reading the testimony taken before the first master.

The Reference to the Successor Auditor Was in Violation of Section 16-1718 of the District of Columbia Code.

It is stated in respondent's brief (p. 6) that Section 16-1718 of the District of Columbia Code applies only to a "special type of consent references". The Court below held that there was no merit to the issue as to compulsory and consent references in view of Rule 53 of the Federal Rules of Court Procedure which makes a distinction only between jury and non-jury actions (116).

Chapter 17 of the District of Columbia Code (Sections 16-1701 to 16-1719) deals with references of questions of law and fact in causes at common law, admiralty or equity and provides for consent references in such causes. Rule 53 superseded Section 16-1701 of the Code insofar as such references may be ordered on consent. However, Rule 53 makes no provision as to the procedure in the event of the death of the referee. In such case, Section 16-1718 which provides that upon the death of a referee, the Court may appoint a successor referee, *upon consent of the parties*, remains in full force and effect, unaffected by Rule 53.

Shima v. *Brown,* 133 F. (2d) 48, cert. den. 318 U. S. 787.

The District Court was therefore without authority to order the reference to the successor auditor, over the objection of petitioners (28-29).

The case of *Ex parte Peterson,* 253 U. S. 300, cited by respondent (p. 6) on this point, has no bearing whatever on this situation. That case merely held that in a jury action, the Court may appoint a master to simplify and clarify the issues and to report thereon preliminary to a trial by jury, where a complicated and intricate account between the parties is involved.

The Reference to the Successor Auditor Was in Violation of Rule 53.

It is stated in respondent's brief (p. 7) that petitioners "now attempt to say that there were no longer complicated issues to be determined" and that the contention that there was no exceptional condition requiring a reference (as provided by Rule 53), is being raised here for the first time.

Respondent himself moved in the District Court to recall the case from reference to the first Auditor on the ground that when the cause was originally referred "there were complicated issues between the original plaintiff and defendant, which have been removed by settlement between those parties, *and there is no necessity for the case being continued before the Auditor*" (16).

The objection of petitioners to the order to the successor Auditor and their exceptions thereto were without limitation as to the grounds of such exception (29).

The Closing of the Hearing Without Affording Petitioners an Opportunity to Submit Evidence Was in Violation of Rule 10 of the District Court.

It is stated in respondent's brief (p. 7) that petitioners "misconceive the purpose of Rule 10 of the district court", and that if "a proper showing had been made to justify a continuance", "the court would have afforded opposing counsel an opportunity to stipulate to relevant testimony, otherwise a further continuance may have been granted." It is further stated (p. 7) that after the affidavit under Rule 10 was filed, "the trial court determined there had been no proper showing to warrant the court in granting any further continuance, and the case was ordered concluded."

The facts as to the submission of the affidavit under Rule 10 are fully set forth under point IV of petitioners' main brief, and on pages 3-4 of this brief and on pages 4-7 of the petition. Contrary to the statements in respondent's brief, the district court did give respondent an opportunity to stipulate, and respondent's counsel did first state that he would stipulate to portions of the affidavit as testimony of petitioners' witness, and then refused to stipulate to any portion of it. Without further change in the situation (except as to the death of the first Auditor), the district court ordered the hearing closed.

Rule 10 of the district court was violated in that notwithstanding the refusal of respondent to admit that petitioners' witness would testify to any of the facts stated in his affidavit, after the district court ordered that petitioners should file such affidavit, a continuance was nevertheless denied without further opportunity to submit evidence.

Petitioners Were Deprived of Their Property Without Due Process of Law.

It is stated in respondent's brief (p. 8) that petitioners' contention as to due process was not raised or argued below. The essentials of due process are jurisdiction, adequate notice and a fair hearing. In the procedural aspect, due process is the constitutional guarantee that every person have his day in court, and reasonable opportunity to be heard and defend. A proceeding strictly *ex parte* offends the Constitutional provision.

Throughout this proceeding, not only in the Court below, but in the District Court, petitioners have asserted that the report on which judgment was entered against them was "totally *ex parte*" (93, 96), that the successor auditor on whose report judgment was entered was without jurisdiction (93, 94), that it was "unjust and unfair" that the cause should be decided "*ex parte*" (93, 96) and that petitioners should be given a reasonable opportunity to present whatever evidence they could in defense (93, 96).

These contentions were fully set forth in the exceptions to the report of the successor Auditor and the motion to suppress it. Such exceptions and motion were considered and referred to by the Court below in its opinion (116).

The statement of respondent that the contention of absence of due process and violation of the Fifth Amendment was not raised or argued below is therefore contrary to the record. It was not necessary for petitioners to state *in haec verba* that due process was not observed or that the Fifth Amendment was violated. The petitioners having been denied a Court (or master) of proper jurisdiction, and having been denied a fair hearing and their day in court, and having had imposed on them a judgment based on a totally *ex parte* proceeding, their statement of such grievances, constituting the particulars and respects in which the constitutional guarantee was denied, was, in ef-

fect, a plea of denial of due process and violation of the Fifth Amendment. Surely, in such circumstances, petitioners should not be deprived of the benefit of the provisions of the constitution, because they did not use the words "due process" or "Fifth Amendment". Moreover, the failure to use such words should not deprive petitioners of a hearing of their grievances in this Court, if, in fact, as the record shows, petitioners were deprived of their property without due process of law and in violation of the Fifth Amendment.

CONCLUSION.

Petitioners submit that the writ of certiorari should be granted.

Respectfully submitted,

EMANUEL HARRIS,
Counsel for Petitioners.